IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Smt. Dayanidhi and another.
vs.
Hukmichand and others.

S.B.CIVIL SECOND APPEAL NO.178/2000 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 10.5.2000 PASSED BY SHRI T.H. SAMMA, ADDITIONAL DISTRICT JUDGE NO.3, UDAIPUR IN CIVIL APPEAL (DECREE)NO.110/1996.

DATE OF JUDGMENT ::: 10.4.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. D Joshi for Mr. JR Patel, for the appellant.

Mr. Jagdish Vyas) for the respondents.
Mr. Manoj Joshi)

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BY THE COURT:

Heard learned counsel for the parties on applications filed under Order 22 Rule 3 CPC and under Order 22 Rule 9 CPC and under Section 5 of the Limitation Act.

The appellant submitted an application under Order 22 Rule 3 CPC on 20.9.2005 stating therein that the appellant

no.2 died on 23.8.2003 but the fact of death of the appellant no.2 came to knowledge of learned counsel of the appellants on 9.9.2005. The appellant without disclosing his any relation or the facts because of which, they preferred appeal jointly before the first appellate court and before this Court, stated that the appellant no.1 had no knowledge of the death of the appellant no.2. Therefore, on knowledge of death of the appellant no.2, the application filed under Order 22 Rule 3 CPC is within limitation.

In the application filed under Section 5 of the Limitation Act, it is again stated that the appellant no.1 had no knowledge about the death of the appellant no.2 and from the date of knowledge of death of the appellant, the application is within limitation and in case, it is held that the application is belated, the delay may be condoned. This application was also filed on 20.9.2005. On the same day, another application under Order 22 Rule 9 CPC has been filed. In this also, it has not been explained that under what circumstances, the appellants no.1 and 2 were prosecuting the first appeal and second appeal together. Apart from it, without explaining as to how the appellant no.1 had no knowledge of the death of appellant no.2 despite the fact that the address of the appellants no.1 and 2 are the same and both are residents of the same village.

The respondents submitted a reply to applications filed under Order 22 Rule 3 CPC, under Order 22 Rule 9 CPC and

Section 5 of the Limitation Act stating therein that the appellants no.1 and 2 are the near relatives and the appellant no.1 also attended the funeral and condolence meeting (uthawana) of the appellant no.2, therefore, the appellant no.1 had full knowledge of the death of the appellant no.2. It is also submitted that even the condolence message was published in the newspaper (copy of which is placed on record by the respondent). In view of the above, the application has been filed deliberately belated because of the fact that there is no merit in the appeal and delay is advantageous to the appellant. It is also submitted that the appellant got the benefit of their negligence as they obtained interim order as back as on 25.4.2001, therefore, in view of the above facts, no ground is made out for condoning the delay on any of the applications. The application has been filed malafidely.

It appears from the applications submitted by the appellant that the appellant without explaining complete facts about how he had no knowledge of death of co-appellant (no.2) particularly in the facts that both are residents of same village and they are said to be near relatives and were prosecuting the first and second appeal together. The application has been submitted taking absolutely wrong pleas ; (1) that they had no knowledge of the death of the appellant no.2 which appears to be factually incorrect and (2) they came to know from their advocate about the death of the appellant no.2 and, therefore, they are moving the application.

In view of the above reason, no sufficient cause has been shown for not filing the application in time in case where one of the appellant died on 23.8.2003 and the application has been filed after two years on 20.9.2005 and particularly when the appellants were enjoying the fruits of the interim order.

The appeal has not been admitted yet and few of the respondents have also died for which, according to the appellants, no relief has been claimed by them in appeal or by the plaintiffs in the suit. Be it as it may, since no sufficient cause has been shown for condonation of delay, therefore, the applications filed under Section 5 of the Limitation Act and under Order 22 Rule 9 CPC deserves to be dismissed, hence, dismissed. Accordingly, the application under Order 22 Rule 3 CPC is also dismissed and consequently, the appeal is dismissed as abated.

(PRAKASH TATIA), J.

S.Phophaliya